Supreme Court, U. S.
FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 79-95

FRED DE GREGORIO,

Petitioner,

vs.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRED DE GREGORIO,

Petitioner-Appellant,

v.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent-Appellee.

Docket No. 79-2062

Before:

HON. STERRY R. WATERMAN, WILFRED FEINBERG, and WILLIAM H. TIMBERS, *Circuit Judges.*

New York, June 18, 1979

Statement made by the court at disposition of appeal in open court.

JUDGE FEINBERG:

You understand that when we dispose of a case in open court we do so under our local rule because we think the issues are clear and can only be decided one way and it is no reflection on the quality of the advocacy. This is an appeal from an order

of the United States District Court for the Eastern District of New York, by Judge Pratt, who was the Judge, which denied appellant's application for a writ of habeas corpus. Appellant had pleaded guilty in the State court to two felony counts charging promoting gambling and usury in violation of New York State law in full satisfaction of six different indictments charging a total of 12 felonies and three misdemeanors. He received a one and a half to three years sentence. He was released from state custody on parole in August, 1978.

Appellant claimed before us on this appeal that he was denied effective assistance of counsel because his lawyer failed to bring a suppression motion to challenge evidence seized pursuant to a search warrant — the probable cause for which was taped conversations made under a state wiretap order. Apparently there was a delay in sealing the tapes which appellant asserts barred use of the tapes for any purpose under the state law, and purpose, thereby vitiating the probable cause for the search warrant. Appellant claims that without the evidence seized pursuant to the search warrant the indictments would have had to be dismissed for insufficient evidence.

We conclude that there was no error by the District Judge in denying appellant's application for a writ of habeas corpus without holding a hearing. Appellant simply was not denied effective assistance of counsel. First, appellant apparently claims only one of his lawyers was ineffective, yet appellant was represented by several lawyers, as many as five at different times, none of whom made the suppression motion that appellant argues should have been made. Second, while it is true as Judge Pratt pointed out in his opinion that a motion to suppress might have succeeded, it is far from obvious that it would have succeeded certainly. The State may have been able to justify the delay in sealing the tapes, and even if the tapes were rendered inadmissible as evidence in chief by reason of the delay it may be that under state law they could still be used to establish probable cause for the search warrant. Compare, for example, a case in

this Court, *United States v. Fury*, 554 F.2d 522 at page 532. The decision not to make a suppression motion, therefore, may have been a tactical one. If the motion were made and lost appellant's bargaining power in the plea negotiations would have been substantially undercut. As it was appellant's counsel made what appears to be a very good plea bargain for appellant. Many major charges were dropped. Considering appellant's status as a second felony offender, the sentence he received was light. We think it is clear that on the issue before us appellant was adequately represented and that the proceedings were so far from a farce or mockery of justice that no hearing is required.

We therefore affirm the judgment of the District Court.

Thank you, Gentlemen.